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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

81-5026

RONALD DOUTHIT,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Butts County, Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

1.

Whether the Petitioner received effective assistance of counsel before trial, during the trial and during the sentencing phase of the trial as found by the State habeas corpus court?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PART ONE STATEMENT OF THE CASE.	1
PART TWO REASONS FOR NOT GRANTING THE WRIT	
I. THE SUPERIOR COURT OF BUTTS COUNTY APPLIED THE PROPER STANDARD AND CORRECTLY DETERMINED THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING ALL PHASES OF HIS TRIAL.	6
CONCLUSION	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

Cases Cited: Page(s)

Carbo v. United States, 581 F.2d 91 (5th Cir. 1978). . 15

Douthit v. State, 239 Ga. 81, 235 S.E.2d 493 (1977). . 2, 3

Douthit v. State, 244 Ga. 471, 260 S.E.2d 875 (1979, cert. denied 445 U.S. 938 (1980). 4

Ewing v. Williams, 596 F.2d 391 (9th Cir. 1979). . . . 15

Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977) . . 13

Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980). . . . 15

MacKenna v. Ellis, 286 F.2d 592 (5th Cir. 1970). . . . 6

Pittman v. State, 149 Ga. App. 729, 256 S.E.2d 67 (1979). 14

Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974) . . 6

Statutes Cited:

Ga. Code Ann. § 27-2534.1(b)(4). 1

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Ronald Douthit, was indicted in Cobb County, Georgia, for the murder of Leonard Karl Frazier. Petitioner was tried by a jury and found guilty of murder. Petitioner was sentenced by the jury to the death penalty based on a finding that the offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value. Ga. Code Ann. § 27-2534.1(b)(4).

Although a detailed statement of facts was set forth by the Supreme Court of Georgia on its initial direct review of Petitioner's conviction, Respondent sets forth the following brief statement for this Court's consideration. The body of Leonard Karl Frazier was discovered in Smyrna, Georgia, on December 17, 1975. Three bullets were recovered from the victim's head during the autopsy. During the investigation of the case, the police learned that the Petitioner and the victim were cousins and that the Petitioner had employed the victim. The evidence submitted at trial showed that the

Petitioner had procured an insurance policy on the life of the victim. Police authorities seized a .22 caliber pistol from the Petitioner. A comparison revealed that at least one of the bullets found in the body of the victim had been fired from that gun. Douthit v. State, 239 Ga. 81, 82, 235 S.E.2d 493 (1977).

Testimony was introduced concerning the Petitioner's interest in insurance policies and the Petitioner's discussing insurance with certain insurance agents. Evidence was introduced to show that the Petitioner had told one individual that he had insurance on his cousin and wanted another policy with double indemnity. Another insurance agent testified that he had written a $15,000.00 life insurance policy with double indemnity on the life of the victim at the Petitioner's request. The agent testified that someone later called him and stated that he was Leonard Frazier and that he wanted the beneficiary of the policy changed to Ronald Douthit. Douthit, supra at 83.

At the hearing on the motion for new trial, the Petitioner contended that the insurance policy was invalid as the premiums were paid by checks on bank accounts which had been closed. The Petitioner contended that, as the insurance company considered the policy not to be in force, there was no motive for the crime. The Supreme Court of Georgia considered this point on direct appeal and stated, "The life insurance policy was obtained by the Defendant [Ronald Douthit], it was in his possession, he had been named the beneficiary less than two weeks earlier, and he had checked to find out that the change in beneficiary had in fact been made." Douthit, supra at 86. That Court also noted that

the insurance company had been seeking payment of the premiums even after the homicide occurred. Thus, the Court concluded that it appeared that the Petitioner at least thought that the policies were in force; therefore, there was sufficient evidence to show a motive based on the insurance policies.

According to police authorities, Petitioner stated that his co-indictee, Rodney Dulaney, shot the victim while the Petitioner was across the street. The Petitioner admitted assisting in moving the body and putting the body alongside the road so that it would be found. It should also be noted that Rodney Dulaney later testified at a hearing on an extraordinary motion for new trial that he did not kill the victim.

The Supreme Court of Georgia cited the holding of the trial court in denying Petitioner's original motion for new trial and held, "A finding by the jury that Douthit, if not the slayer, was the 'master mind' of the crime, was warranted." Douthit, supra at 84. The Supreme Court of Georgia also upheld the conviction and death penalty. No petition for certiorari was filed from that decision.

Petitioner subsequently filed a petition for a writ of habeas corpus in the Superior Court of Butts County. That Court dismissed the petition due to the issues raised so that the Petitioner could file an extraordinary motion for new trial in the Superior Court of Cobb County.

At the hearing on the extraordinary motion for new trial in the Superior Court of Cobb County, Petitioner attempted to show that he was not the triggerman in the murder of Leonard Frazier, but that Rodney Dulaney actually shot Frazier. Petitioner produced his co-indictee, Rodney Dulaney, as a witness in Petitioner's behalf. Dulaney testified that the Petitioner shot Frazier, although Dulaney did admit being

present in the house when the shooting took place. Petitioner testified before the Court that he did not shoot Leonard Frazier.

The Superior Court of Cobb County denied the extraordinary motion for new trial. The Court found that the first three grounds had been raised in the original direct appeal to the Supreme Court of Georgia. The Court also found that there was no evidence introduced in support of the claim that Petitioner was not the triggerman. The Court also noted that this would not necessarily constitute newly discovered evidence so as to justify the granting of an extraordinary motion for new trial.

Petitioner appealed from the ruling of the Court to the Supreme Court of Georgia. That Court affirmed the lower court's ruling and held that there was no basis for granting the extraordinary motion for new trial. A petition for certiorari was subsequently filed challenging both the decision of the Supreme Court of Georgia on direct appeal and the decision following the extraordinary motion for new trial. This Court denied certiorari on March 17, 1980. Douthit v. State, 244 Ga. 471, 260 S.E.2d 875 (1979), cert. denied 445 U.S. 938 (1980).

Petitioner then filed the instant petition for a writ of habeas corpus in the Superior Court of Butts County. In that petition, Petitioner raised among other issues the effectiveness of his counsel during all phases of his trial. In the Superior Court it was found that there was no merit to any of the allegations raised by the Petitioner and denied habeas corpus relief on November 14, 1980. The application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on April 13, 1981.

Petitioner has now filed the instant petition for a writ of certiorari in this Court challenging the findings of the Superior Court of Butts County concerning the effectiveness of his trial counsel.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE SUPERIOR COURT OF BUTTS COUNTY APPLIED THE PROPER STANDARD AND CORRECTLY DETERMINED THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING ALL PHASES OF HIS TRIAL.

In the Superior Court of Butts County, Petitioner listed some thirteen grounds alleging ineffective assistance of counsel. Petitioner has again raised this issue before this Court enumerating approximately the same allegations concerning his counsel's performance in his behalf. Respondent submits that the Superior Court of Butts County applied the proper standard and correctly determined that Petitioner received effective assistance of counsel.

The Superior Court of Butts County applied the standard set forth by the Fifth Circuit Court of Appeals and the Supreme Court of Georgia in considering the effectiveness of Petitioner's counsel, that is, effective assistance of counsel means "Not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 286 F.2d 592, 599 (5th Cir. 1970); Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974). Thus, the Superior Court of Butts County properly applied federal constitutional principles to the facts in the instant case.

In considering the allegation of ineffective assistance of counsel, it is necessary to consider the facts and circumstances surrounding the representation of the Petitioner. Petitioner's family was referred to Mr. Eugene Deal early in the case as an attorney to represent the Petitioner. Petitioner's sister discussed the case with Mr. Deal before Petitioner was arraigned and paid Mr. Deal a portion of the fee. Mr. Deal subsequently talked to the Petitioner's grand-

mother and with Petitioner. Mr. Deal was made aware of the fact that Petitioner did not have any money, but that Petitioner's family would pay for Mr. Deal's services.

Mr. Deal testified at the State habeas corpus hearing that he made a motion to sever Petitioner's case from that of his co-defendant and filed a Brady motion to obtain the file of the District Attorney. He had access to everything that was in the file of the District Attorney at the time of the Brady motion. Mr. Deal talked with Petitioner and members of Petitioner's family on several occasions and was well aware of the facts involved in the case. The only witness Mr. Deal was unable to talk with before trial was the insurance agent from Indiana, Roy Ursin. Mr. Deal testified that he felt that the Petitioner would not be convicted based on the evidence that he knew was available to the District Attorney and that he felt certain that the case would never reach the penalty phase.

From the evidence submitted at the habeas corpus hearing and from the transcript of Petitioner's trial, it can be seen that Mr. Deal conducted an extensive voir dire examination of the potential jurors, questioning them concerning their possible prejudice based on publicity or on Petitioner's race. Mr. Deal also made numerous objections to evidence at trial and cross-examined the witnesses of the State. A detailed closing argument was presented on behalf of the Petitioner by Mr. Deal. A brief argument was made by Mr. Deal at the conclusion of the penalty phase of the trial at which time he asked for mercy for his client.

Since the time of the trial, Mr. Deal has filed a direct appeal for the Petitioner raising several allegations in the Supreme Court of Georgia. Mr. Deal also participated in the filing of Petitioner's first habeas corpus action as well as in the filing of the extraordinary motion for new trial in the Superior Court of Cobb County. Thus, Mr. Deal

did not abandon his client, but continued to work zealously in his behalf even after the Petitioner had been convicted.

Mr. Deal also testified before the habeas corpus court that he had considerable experience in criminal cases. He has been in practice since 1965 and some fifty percent of his practice has involved criminal cases. Thus, Petitioner's retained attorney was knowledgeable and experienced in the field of criminal law.

Several of Petitioner's allegations concerning ineffective assistance of counsel relate to the motive for the crime, that is, the possession of an insurance policy on the life of the victim. Petitioner asserts that his counsel did not investigate the insurance motive theory and did not interview Mr. Roy Ursin prior to trial.

Mr. Deal testified at the State habeas corpus hearing that he knew that Petitioner did not have any money and that Petitioner's bank accounts were closed. Mr. Deal testified that he did not know that the insurance agent would testify at trial that the premiums were paid by automatic bank check. Petitioner was aware of this information and could have made it available to his counsel prior to trial. Mr. Deal did not have a chance to discuss this with the witness prior to trial and did not have the evidence available to him. He only knew that the insurance agent would testify that there was an insurance policy. He did not see any need to interview the agent as he thought he knew all of the testimony that the agent would relate.

Mr. Deal also testified that he thought the Petitioner was not guilty and that the jury would find him innocent even after the testimony of the insurance agent. Furthermore, evidence introduced at trial showed that two of the premiums

on the insurance policy had been returned unpaid, but the insurance company was still seeking payment at that time. Petitioner criticizes his attorney for not determining that the insurance policy was not in effect at the time of trial and not obtaining records to rebut this testimony. However, as noted by the State habeas corpus court, "Even assuming trial counsel had produced evidence showing that the policy was not in effect at the time of the murder, the jury would still have been authorized to find that the Petitioner was not aware of this fact." (Habeas Corpus Order 5). The critical fact was whether the Petitioner believed the policy to be in effect. The habeas corpus court properly found that the failure of trial counsel to find and produce the evidence could not have been said to have made any difference in the outcome of the trial. Furthermore, "Petitioner has not demonstrated that his counsel could likely have discovered what the witness and the District Attorney did not - that the policy was not in effect at the time of the murder." (Habeas Corpus Order 6). The fact that the policy was invalid was not discovered by anyone until some months after the trial had been concluded. Therefore, it could hardly be said that counsel's action was ineffective in failing to discover what no one else was able to discover at the time of the trial.

Petitioner also asserts that his counsel was ineffective in failing to file motions to suppress his statements and suppress evidence obtained from a search warrant. As noted previously, Mr. Deal did file a Brady motion and a motion for severance, both of which were granted prior to trial. From Mr. Deal's testimony and conduct at trial, it is clear that he did investigate the case and was well acquainted with the facts before trial. The only information he had not obtained was the actual search warrant itself and the information from the insurance agent that the policies were paid by automatic bank checks. As of the present date, a search warrant has still not been produced, although various

officers did testify that the warrant was in existence.

There was also sufficient evidence to show that Petitioner's arrest was legal and that there was no illegal search and seizure conducted. The testimony at trial showed that a search warrant was issued based on information supplied by the police officers. The officers testified that at the time of the murder, they discovered that there were two brothers of the victim in the Cobb County Jail. They obtained statements from both of these individuals implicating Petitioner and Rodney Dulaney. The officers obtained a search warrant pursuant to their information to search the residence where Petitioner and Dulaney resided. When the officers went to the residence, there was no one present. Petitioner and his co-defendant arrived as the officers were conducting the search.

Only one item was actually removed from Petitioner's residence, that is, a strip of metal from a screen in the basement. The Petitioner pointed this out to the police himself when he showed them where his co-defendant allegedly shot the victim. The only other item obtained as a result of the search warrant was the insurance policy on the life of Leonard Frazier. This policy was not removed from the residence, but was removed from the trunk of the Petitioner's car. Petitioner voluntarily told a police officer where the policy was and turned it over to them. Under these facts, it is clear that there was actually no search as the Petitioner pointed out all the items to the police officers. There was probable cause to make the search pursuant to the warrant, but this was not even necessary. Thus, as there was no illegal search and seizure, there could be no ineffective assistance of counsel due to Mr. Deal's failure to file a motion to suppress.

Respondent further asserts that there was no illegal arrest as the officers had probable cause to arrest the Petitioner based on the insurance policy on the life of the victim and the knowledge that the Petitioner was named as beneficiary on that policy. Furthermore, they had other statements implicating the Petitioner and Rodney Dulaney. Petitioner did make a statement to the authorities which was not objected to at trial when it was introduced. In considering all the evidence introduced at trial and at the hearing on the extraordinary motion for new trial, it is clear that the statements made by the Petitioner were voluntary. None of the allegations made by the Petitioner in which he asserts that he was threatened or that threats were used against his co-defendant have ever been substantiated in any regard. Mr. Deal testified before the State habeas corpus court that Petitioner never told him of any alleged threats or of any coercion used to get him to make a statement. Only after the direct appeal had been completed was Mr. Deal aware of any alleged threats that had been made. Thus, Mr. Deal could have seen no reason to argue that the statements be suppressed. Mr. Deal also testified that in his opinion the statements did not amount to a confession in that the Petitioner only told the police where the gun could be located and that he did not participate in the shooting.

Absent a showing that the statement made by the Petitioner was involuntary, Respondent asserts that there could be no ineffective assistance of counsel based on the failure to request a Jackson v. Denno hearing. Furthermore, the statements were actually exculpatory and did not rise to the level of a confession. Mr. Deal exercised his judgment and determined that there was no need to request a Jackson v. Denno hearing or challenge the admissibility of Petitioner's statements.

Petitioner also asserts that his counsel took a pro forma approach to his trial and did not present any evidence in his behalf. Clearly, no witnesses were called at the trial in Petitioner's behalf. Mr. Deal testified that he knew that Petitioner did not have any money and that Petitioner's bank accounts were closed, but that he did not know that the insurance agent would testify that the premiums were paid by automatic bank check. Had Petitioner made this information available to counsel prior to trial, Mr. Deal could have procured this information in time to have it produced at trial. Mr. Deal continually thought that Petitioner would not be convicted as he did not believe there was sufficient evidence presented against Petitioner. Evidence was introduced at trial showing that two of the premiums of the policy had been returned unpaid, even though the insurance company was still seeking payment at that time. Furthermore, as previously noted, the insurance company considered the policy to be in effect at the time of the trial and did not discover that the policy was not in effect until two months after the trial had been concluded. Petitioner could hardly expect his attorney to discover what the insurance company and the District Attorney could not have discovered. As noted by the habeas corpus court, Petitioner did not demonstrate that his counsel could have discovered what the insurance company and the District Attorney could not. Petitioner has shown no evidence that his counsel could have introduced in his behalf that would have tended to show his innocence in this matter.

Petitioner asserts that his counsel was ineffective in that he only conducted a general voir dire examination. In reading the voir dire examination conducted by Petitioner's attorney, it can be seen that he asked numerous questions of each juror. He asked various jurors if they had ever been

acquainted with the victim or his family. He asked jurors if they had relatives that were police officers or if they had knowledge of any of the District Attorney or of his staff. Several jurors were questioned concerning possible effects of publicity and numerous jurors were questioned to see if they would show any bias to the defendant because he was black. Based on the evidence found in the trial transcript, it is clear that the voir dire conducted by Mr. Deal was meaningful and sufficient to make an intelligent jury selection. Mr. Deal also testified at the State habeas corpus hearing that as far as he could tell he thought that he had obtained an impartial jury. (H.T. 82).[1/]

Petitioner also asserts that his counsel was ineffective because he waived his right to make an opening statement. Petitioner's counsel requested that he be allowed to reserve his opening until after the State had presented its evidence. The trial court exercised its discretion and required Mr. Deal to present his opening statement before any evidence was presented or waive such statement. Mr. Deal testified at the habeas corpus hearing that he felt it would be better for him not to make any opening statement at all. Clearly, this is a tactical decision on the part of counsel for the Petitioner and did not amount to ineffective assistance of counsel. Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977).

Petitioner also asserts that his trial counsel did not allow him to testify at trial. Mr. Deal testified at the habeas corpus hearing that Petitioner wanted to testify, but the District Attorney was a very experienced trial attorney. He did not feel that Petitioner would be able to withstand cross-examination by the District Attorney. According to Mr. Deal he and Petitioner's sister talked the Petitioner out of

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1/ H.T. refers to the transcript of Petitioner's State habeas corpus hearing.

testifying. Clearly, this is a tactical decision on the part of trial counsel. He obviously informed the Petitioner of his reasons and encouraged the Petitioner not to testify. This does not constitute ineffective assistance of counsel. See Pittman v. State, 149 Ga. App. 729, 256 S.E.2d 67 (1979).

Petitioner's remaining allegations deal with trial counsel's preparation for the penalty phase of the trial. Petitioner asserts that Mr. Deal could have introduced evidence pertaining to Petitioner's good character and reputation in the community. Petitioner submitted affidavits and testimony on this point.

Mr. Deal's main point in regard to presenting mitigating evidence was that he did not think that the trial would ever get to the sentencing phase. The State did not introduce any new evidence in aggravation at the sentencing phase and, thus, Mr. Deal did not feel that any mitigating evidence introduced by the Petitioner would have been helpful. The sole aggravating circumstance relied on by the State was the fact that the killing was done for the purpose of obtaining money. This had already been proven at the trial. As the jury had already determined that the aggravating circumstance existed, it was clear that they had also already determined that there was evidence that would justify their imposition of the death penalty. Furthermore, one witness at trial did indicate that Petitioner did not have any prior convictions. Although in hindsight, Petitioner may argue that his counsel could have done additional things in his behalf, this is not sufficient to render his performance ineffective. It was noted by the State habeas corpus court, "Measuring Petitioner's representation against the standard for handling death cases in Georgia, of which this Court has seen many, the Court cannot conclude that Petitioner's representation was so ineffective that his constitutional rights were denied. Most counsel in these

cases do not offer evidence during the sentencing phase. The Court cannot say it is likely that the evidence proffered at the habeas hearing would have made any difference in the jury's sentence. (See H.T. pp. 93-95, 98)." (Habeas corpus order at 7). The Court went on to note that it could not say that a more lenghthy argument on the issue of punishment would have been likely to produce a different result.

Claims of ineffective assistance of counsel require an inquiry into the actual performance of counsel and then a determination of whether the performance constituted reasonably effective assistance based on the totality of the circumstances. Carbo v. United States, 581 F.2d 91, 92 (5th Cir. 1978). The mere fact that present counsel would have acted differently at the time of trial is not sufficient to render trial counsel ineffective. Futhermore, where an allegation of ineffective assistance of counsel is based on specific acts or omissions of counsel, "The allegations must be buttressed by a showing of injury or prejudice to the defendant." Lovett v. Florida, 627 F.2d 706, 710 (5th Cir. 1980), quoting Ewing v. Williams, 596 F.2d 391, 395 (9th Cir. 1979). Thus, Petitioner has not shown any way in which his constitutional rights have been violated as he has not shown that he received ineffective assistance of counsel. Therefore, no constitutional question is presented for review by this Court.

CONCLUSION

For the above and foregoing reasons Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Ronald Douthit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States Mail with proper address and adequate postage to:

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This 6th day of August, 1981.

JOHN C. WALDEN